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FILED
JUL 7 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 208

EXCHANGE NATIONAL BANK OF CHICAGO,
Cross-Petitioner,

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR. and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,
Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Cross-Petitioner,

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR. and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION OF EXCHANGE NATIONAL BANK FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Allied Realty of St. Paul, Inc. (hereinafter "Allied Realty") respectfully opposes the cross-petition of Exchange National Bank of Chicago (hereinafter "Bank") for the issuance of a writ of certiorari to review certain portions of the judgment of the United States Court of Appeals for the Eighth Circuit entered March 26, 1969.

QUESTION PRESENTED

Where an attorney is enjoined from participating in private litigation because he is found to be in violation of Canon 36:

1. does all information he learned about, examined or obtained in the course of his public employment become *ipso factor* suppressed in the private litigation;

2. may other attorneys who are not partners or associates of his, or in concert with him and who are not within the scope of Canon 36 be disqualified from participating in the private litigation by application of Rule 65(d) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Respondent Allied Realty deems it necessary to supplement the statement of the case supplied by the Bank, because the Bank's statement does not fully present the facts relevant to its cross-petition.

1. Nature of the Judgment of which Review is Sought.

This action was commenced in the District Court of Ramsey County, Minnesota on September 17, 1965 and thereafter removed to the United States District Court, District of Minnesota, where it is now awaiting trial (R. 37-38). The purpose of the suit is to nullify a mortgage held by the Bank on premises owned by Allied Realty on the grounds that the Bank paid the proceeds of the mortgage to the principals of Allied Realty personally, and that they, with the Bank's knowledge, used said proceeds for their own benefit. In November of 1967,

Sidney P. Abramson was added as additional counsel for Allied Realty (R. 38).

The Bank moved the district court for an order declaring Sidney P. Abramson to be in violation of Canon 36, and also for an order "restraining, enjoining and disqualifying Abramson, his agents, servants, employees, and attorneys, and all persons in active concert or participating with him, or with them," from:

(a) participating further as counsel in this case or in any case involving claims against the Bank connected with the Kitzers;

(b) using evidence, knowledge or information "learned about, examined or obtained by Abramson in the course of his former official position";

(c) commencing any action or proceeding against the Bank by filing the draft complaint attached as Exhibit D to the Bank's complaint in the matter of *Exchange National Bank of Chicago v. Sidney P. Abramson*, File No. 3-68-Civil 24, or any other complaint involving any of the same matters alleged in said draft complaint and prepared by or with the assistance of Abramson (R. 25-27).

The Bank also moved for an order expunging from the files in these proceedings the amended complaint filed on November 24, 1967 (R. 27).

The district court by order dated April 11, 1968 found Abramson to be in violation of Canon 36. With respect to (a), (b) and (c) above, the district court denied the Bank's motion except insofar as it related to Sidney Abramson. As to (a), the court in its memorandum accompanying its order said that it was not authorized nor inclined to remove other attorneys for the receiver from continuing to serve in this or any other

case; as to (b), the court said there is no showing that Allied Realty intends to use anything but documents or information which are either public or otherwise discoverable; and as to (c), the court said that it did not wish in any way to prohibit or thwart the receiver's prosecution of this or any other lawsuit (R. 111-112). The court denied without comment the Bank's motion for an order expunging from the files in these proceedings the amended complaint filed on November 24, 1967.

The Court of Appeals for the Eighth Circuit affirmed the lower court's denial of the motion, and the Bank now seeks review by certiorari of this portion of the judgment.

2. Facts.

The complaint in this action was prepared and served by the law firm of Briggs and Morgan, general counsel for the receiver of American Allied Insurance Company. Allied Realty is a wholly owned subsidiary of American Allied. Mr. Abramson did not participate in any way in the action until November 1967, (R. 38), over two years after the commencement of the action.

There was at the commencement of the litigation ample information and documentation available to Allied Realty supporting the allegations of the complaint. In the summer of 1965 there was a trial in the District Court of Ramsey County entitled *Cyrus E. Magnusson as Commissioner of the State of Minnesota v. American Allied Insurance Company*, File No. 341749, as a result of which American Allied was declared insolvent and placed in receivership. The receiver had access to the transcript and the exhibits of that trial (R. 38). In addi-

tion, he had available to him all of the books and records of American Allied and its affiliated corporations (R. 37).

After commencement of this action the receiver sat through the criminal trial in Bismarck, North Dakota, in the spring of 1967, testified in said trial, heard the testimony of the witnesses and examined many of the exhibits offered in evidence by the parties to said proceedings, and obtained a copy of the transcript and the exhibits (R. 39). Furthermore, interrogatories have been served by Allied Realty upon the Bank, and answers have been received describing documents, attaching copies of said documents to the answers and giving names and dates pertinent to the litigation (R. 39). Additional discovery will be taken in the future. It is apparent that Allied Realty does not and never has relied on Mr. Abramson as a source of information in this suit, nor on any supposedly "secret" or "confidential" evidence to establish its case against the Bank.

The Bank does not claim, and the record does not support any claim, that any person acting for Allied Realty is an agent, servant, or employee of Mr. Abramson. None of the attorneys representing Allied Realty in this case are partners or associates of Mr. Abramson. Mr. Abramson will not directly or indirectly derive any financial benefit out of the fees paid by Allied Realty in connection with this action. The district court noted in its memorandum accompanying the order disqualifying Abramson that the breach of Canon 36 which it found to have taken place was inadvertent on the part of Mr. Abramson, and stated that by its decision it did not impugn in any way Mr. Abramson's character or integrity (R. 103-04).

ARGUMENT

Canon 36 Does Not Authorize the Disqualification of Persons Other Than Abramson Nor the Suppression of Evidence Nor the Prohibition of the Institution of Any Law Suit.

The district court disqualified Mr. Abramson's further participation in this case on the basis of Canon 36 which provides in pertinent part:

> A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such employ or office.

The canon operates against specific conduct of an attorney: namely, the acceptance of employment after his retirement from public office. The canon's purpose is to regulate a lawyer's conduct; it contains not a single word that in any way suggests that it is intended to disqualify or suppress any information or material. This is in contradistinction to Canons 6 and 37 (not involved here) which expressly forbid the divulgence of secrets or confidences and impose upon the attorney the duty to preserve such confidences.

Neither is there any language in the Canon which would permit a court to use it to disqualify an attorney other than one who had previously held public office. The Court of Appeals said in its opinion below:

> As previously pointed out, this action was commenced prior to Mr. Abramson's appointment by other attorneys representing the plaintiff. We find nothing in the plain

language of Canon 36 which would indicate that it is designed under ordinary circumstances such as here to reach beyond the attorney who previously held public office. The purpose of the Code of Ethics is to prescribe standards of conduct for attorneys. Such purpose with respect to Canon 36 is served by the disqualification of Mr. Abramson. The canon makes no provision either directly or by fair implication for abridging any right of the plaintiff or any other attorney who does not share fees with the disqualified attorney. The Code of Ethics applies generally to attorneys, not to litigants. Absent a fee sharing arrangement with the former public official, neither the plain words nor the policy underlying the canon requires that unrelated attorneys be barred from their right to represent the plaintiff.

The Bank is trying to convert the canon into a tactical device for private litigants, and seeks by the use of this device to immunize itself from all attempts to assert claims against it arising out of or connected with the transactions involved in the criminal proceedings.

Rule 65(d) Cannot Be Used To Extend the Scope of the Canon.

The Bank relies on Rule 65(d) of the Federal Rules of Civil Procedure as authority for the disqualification of attorneys other than Abramson and for the suppression of evidence. This reliance is misplaced. The Rule provides that every order granting an injunction,

> "is binding only upon the parties to the action, the officers, agents, servants, employees, and attorneys and

upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The injunction entered by the District Court prohibits Abramson from further participation in this case. If any party to the action or its officers, agents, servants, employees, or attorneys, or persons in concert with them, should aid or encourage Abramson to participate in this case, such persons would be in violation of the injunction and subject to the court's contempt powers by virtue of Rule 65(d). The Bank has twisted the meaning of the Rule and seeks to use it to disqualify attorneys other than Abramson from participating in the case and to prohibit the use of information by persons other than Abramson.

The purpose of Canon 36 is to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official. This purpose is fully served by the disqualification of Abramson.

The Bank Seeks An Advisory Opinion Relating to the Admissibility of Evidence Which Has Not Been Presented to the District Court Solely on the Basis that Abramson Learned About It, Examined It or Obtained It in the Course of His Official Position.

The Bank seeks to enjoin the use, disclosure or transmittal of any information "learned about, examined or obtained by Abramson in the course of his former position". The information in controversy is contained in the record of the criminal trial held in Bismarck, North Dakota, in the spring of 1967, in the transcript of the receivership trial held in Ramsey

County, Minnesota, in the summer of 1965, and in the various books and records of the American Allied receivership. These are all public records. If the Bank's motion were to prevail it would only have to prove that a particular item of evidence was learned about, examined or obtained by Abramson, and upon such proof the evidence would forthwith be suppressed. No doubt Abramson learned about a great deal of information in connection with his participation in the criminal proceedings. The suppression of all such information for the sole reason that Mr. Abramson happened to learn about it would certainly give a new twist to Canon 36: it would provide a windfall to the Bank in terms of its strategic position vis-a-vis Allied Realty, and would result in a trial in which the truth would never be disclosed, and any judgment entered would be based upon an incomplete understanding of the matters alleged in the complaint. In denying this portion of the motion, the district court said at R. 111 and 112:

> As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even though such may have been "examined or obtained" by Abramson.

The Eighth Circuit, in its opinion, after pointing out that Canon 36 contains no prohibition against documents or information obtained while a public servant, said:

"The record in the case before us shows that the information in controversy appears in the record of the criminal trial and that the information is not confidential."

The Authorities Cited by the Bank Are Not in Point.

The Bank relies on *United States v. Mahaney*, 27 F. Supp. 463 (1939). There, an attorney, while employed by the United States government, had access to confidential information relating to the Bank of America. Thereafter he was employed by the Bank of America, and while so employed he studied the charges and proceedings relating to the Bank of America. He was told by other counsel for the government, that his acceptance of employment with the Bank of America was unthinkable. The court disagreed with the contention that his employment was made in good faith and that the Bank of America was innocent of any impropriety. At the instance of the United States government, the court temporarily enjoined the defendants from using in the pending litigation by the government against the Bank of America the confidential information obtained by the attorney while employed with the government.

The *Mahaney* case involves an attorney who deliberately placed himself in a position adverse to his former client, the United States government, without the consent of the government and in face of its disapproval, and used confidential information which he had received while attorney for the government. Moreover, it was the United States government who sought the injunction. The case is wholly inapplicable to this case.

In its opinion the Court of Appeals for the Eighth Circuit said that the *Mahaney* case "affords no support for defendant's position".

In *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F. 2d 530 (7th Cir. 1968), an order of the F.T.C. was set aside because it was based in part upon documents admittedly stolen from the petitioner and because the use thereof was an unreasonable search and seizure. It has no application to the instant case. *Knoll* did not involve a construction of any canon of ethics; it involved the determination of the admissibility of specific evidence which had been presented to the trier of fact; it did not involve the present situation where the information in controversy is contained in the transcripts and exhibits of cases tried in open court and available generally to the public.

There Are No Grounds for the Issuance of a Writ of Certiorari in This Case.

Rule 19 of the Rules of the Supreme Court of the United States sets forth the considerations governing review by certiorari. The Bank has not alluded to Rule 19 nor attempted to show how its cross-petition comes within the scope of that Rule. There is no federal question of substance; no conflict between courts of appeal; and no important questions of state or federal law. For the most part, the questions presented are simply questions of evidence. If at trial Allied Realty seeks to offer any evidence which is inadmissible for any reason, the district court, having the evidence before it, can make an informed ruling. If its ruling is in error, there will be opportunity for appeal after trial.

CONCLUSION

The Bank is asking the aid of this Court to either shield it from this litigation or, failing that, to help it suppress the truth about the allegations in the complaint. It has neither precedent nor reason for its position; it has not shown any facts which indicate that improper evidence might be used against it; it has shown no grounds for the issuance of a writ of certiorari. Justice requires that the Bank's cross petition be denied.

Respectfully submitted,

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